No. 12,594

IN THE

United States Court of Appeals

For the Ninth Circuit

P. G. TAYLOR, SEATON PORTER, HENRY W. BUTLER, R. W. HAMMILL, W. E. HAMILTON, FRANCIS BLOSSOM, D. J. WALSH, HARRISON SMITH, P. S. PELLETIER, WYNN MEREDITH, Individually and Doing Business as SANDERSON & PORTER and SANDERSON & PORTER, a Partnership,

(Defendants) Appellants,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,

Appellees.

TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, a Corporation, and THE INDUSTRIAL COMMISSION OF ARIZONA, a Public Agency,

(Intervenors) Appellants,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,

Appellees.

Defendants-Appellants' Opening Brief

Upon Appeal from the District Court of the United States for the District of Arizona.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Hon. CLAUDE McCOLLOCH of Oregon Presiding

We have styled this brief as just above written for the ason that the intervenors-defendants have also filed an peal and we thought it would avoid confusion by des-

ignating ourselves as indicated. Separate briefs will no doubt be filed by the other appellants. There is, however, but one Transcript. Figures in parentheses refer to Transcript pages.

I.

JURISDICTIONAL STATEMENTS

A. District Court

On October 25, 1949, appellees, husband and wife, filed their complaint against these defendants-appellants (also for convenience referred to as Sanderson & Porter) in the Superior Court of the State of Arizona, in and for the County of Pima (at Tucson) for damages for personal injuries to appellee, John E. Hubbell, alleged to be due to the negligence of defendants-appellants, and they prayed for judgment that any election, apparent election to take compensation or waiver under the Arizona Workmen's Compensation Act by appellee John E. Hubbell be held void and that they have judgment against defendants-appellants for $205,000.00 (12). (After removal and just prior to trial appellees reduced their claim to $125,000.00 and withdrew their prayer that said elections, etc., be declared void (100)). The same day summons was issued and duly served on defendants-appellants, through their agent in Tucson, Arizona (19). On November 10, 1949, defendants-appellants filed in the District Court their petition for removal of the cause to said District Court, together with the other papers required by law, and served written notice thereof upon appellees (2).

The District Court had original jurisdiction of the action because it is civil in nature, involves a matter in controversy exceeding the sum or value of $3000.00 exclusive of

interest and costs, and is between citizens of different states. Title 28, Sec. 1332(a) (1) United States Code.

The case was removable and properly removed from the Superior Court to the District Court by virtue of the proceedings taken under the provisions of Title 28, Secs. 1441(a) and 1446, United States Code (Removal Petition 2).

After removal, the intervenors (whom we will for convenience style intervenors-appellants) were allowed by order of Court to intervene as defendants pursuant to stipulation of the parties (51).

After the motion of defendants-appellants to dismiss (25) and the motions to dismiss and for summary judgment of intervenors-appellants, (48) in which latter motion defendants-appellants joined, (55) were denied, (55) the case was tried to a jury on the complaint and answers of the parties, and resulted in a verdict (79) for the appellees against these defendants-appellants in the sum of $50,000.00, upon which judgment in said amount was entered on April 14, 1950. (80) Impressed thereon was a lien in favor of Industrial Commission of Arizona for $1659.19 (81). On April 17, 1950, defendants-appellants filed their motion to set aside the verdict and for judgment notwithstanding the verdict under Rule 50, Rules of Civil Procedure of the District Courts of the United States (84 to 87) and on April 24, 1950, their motion for a new trial (88 to 91). The former motion was denied on April 24, 1950, (91) and the latter on May 15, 1950 (92).

B. This Court

On May 22, 1950, these defendants-appellants filed their notice of appeal to this Court (92) and thereafter completed the record as required by law.

The controlling statutes and rules are Title 28, Secs. 1291 and 1294(1) United States Code, and Rules 73 to 76, inclusive, of the Rules of Civil Procedure of the District Courts.

* * * * * * *

While the points raised by the appeal of intervenors-appellants are, we believe, the same as most of the points raised by these defendants-appellants, the latter raise additional points and for that reason and because the approach to the problems involved by the intervenors-appellants is that of an agency of the State of Arizona, we ask the indulgence of the Court to our submission of briefs separate from those of the intervenors-appellants.

II.

STATEMENT OF THE CASE

The complaint alleges that appellee John E. Hubbell was employed by Tucson Gas, Electric Light & Power Company, a corporation, one of the intervenors-appellants, as a lineman and that he was working in that capacity on June 17, 1949, when he was injured by reason of the negligence of these defendants-appellants who were alleged to be engaged as an independent contractor under the firm name of Sanderson & Porter, in the construction of a power plant for said Power Company on certain premises in Pima County, Arizona, called herein DeMoss Petrie Power plant, in that these defendants negligently failed to advise

said appellee that certain conductors and switches on which said appellee was working had been energized with electricity.

It is alleged in the complaint (6 to 12) that said intervenor-appellant Tucson Gas, Electric Light & Power Company carried compensation insurance under the Workmen's Compensation Law of the State of Arizona with the Industrial Commission of Arizona, the other intervenor-appellant, and that appellee John E. Hubbell was covered thereby; that he filled out forms for compensation under said Act and received compensation checks and medical benefits from the said Commission; that any apparent election made by said appellee to accept the benefits of said insurance and thus be foreclosed from suing defendants-appellants was not binding; that he had made a binding election of remedy in writing, copy attached to the complaint, the same being that he elected to proceed under the provisions of Sec. 56-949, Arizona Code Annotated 1939, (see Appendix hereto) against a third party, to wit, these defendants-appellants, with compensation claim against his employer, said Tucson Gas, Electric Light & Power Company, and the Industrial Commission of the State of Arizona, the employer's insurance carrier, only to the deficiency, if any, between the amount which he might collect from the said third party and the compensation provided or estimated under the Compensation Act, and that he agreed not to compromise any action for personal injuries without the approval of said Industrial Commission (14).

These defendants-appellants by their answer admitted that the appellee John E. Hubbell was employed by the said Tucson Gas, Electric Light & Power Company as a

lineman and working in that capacity at the time he was injured, denied that they were engaged as independent contractors, and in that connection alleged that they were employed by the said Tucson Gas, Electric Light & Power Company, the employer of said appellee; denied that they were negligent and pleaded contributory negligence; and alleged that appellee John E. Hubbell had elected to accept compensation under the Compensation Act of the State of Arizona, had actually accepted compensation benefits under said Act, and that thereby his claim against these defendants-appellants was assigned to the Industrial Commission of the State of Arizona and that appellees were not in a position to maintain this action against these defendants-appellants (60 to 63).

At the trial the Court, after denying the motions of defendants-appellants and intervenors-appellants for a verdict for defendants-appellants (149), submitted to the jury issues involving negligence, contributory negligence, and the matter of damages, but did not submit to the jury and refused the request of these defendants-appellants to charge the jury with respect to the issues, namely, whether these defendants-appellants were third parties within the meaning of the Compensation Laws of the State of Arizona and whether the said appellee had made a binding election to accept the benefits of the Compensation Act of the State of Arizona and thereby foreclosed the appellees from maintaining this action (149, 150, 154, 155).

No point is made on this appeal by these defendants-appellants as to the correctness of the verdict and judgment with respect to the issues of negligence, contributory negligence or the amount of damages, and the appeal there-

fore is confined, as far as these defendants-appellants are concerned, to the following basic questions, as presented by the evidence and record:

Succinct Statement of Questions Involved

Does the evidence in this case conclusively establish as a matter of law, as held by the Court below:

(a) that defendants-appellants (Sanderson & Porter) were persons "not in the same employ" as appellee John E. Hubbell at the time of his injury on June 17, 1949, so as to render them (Sanderson & Porter) liable under the provisions of the Workmen's Compensation Act of the State of Arizona for negligence to appellee John E. Hubbell, an employee and insured under the Workmen's Compensation Act by the compensation policy of intervenor-appellant Tucson Gas, Electric Light & Power Company;

(b) that said appellee did not make a binding election to accept compensation from the Industrial Commission of the State of Arizona, the insurance carrier for said employer of said appellee, for his injuries and did not by reason of his actions in applying for and receiving compensation and other benefits under said policy issued pursuant to the Arizona Workmen's Compensation Law make an assignment to the said Commission of his claim, if any, against defendants-appellants (Sanderson & Porter) as non-employees of said Tucson Gas, Electric Light & Power Company; and that said appellee was not required to proceed further before the said Commission or the Arizona Supreme Court for relief after the said Commission

refused to accept his attempted election of remedy dated October 25, 1949?

The manner in which these questions were raised below (in addition to motions to dismiss and for summary judgment and motions made at close of appellees' case in chief, all being denied) was by defendants-appellants' answer (57, 60 to 63), motion for an instructed verdict in their favor made at the close of the entire case (142 to 144), motion that the verdict be set aside and judgment entered in their favor filed pursuant to said Rule 50 (84 to 87) and by paragraphs II and VII and I of Instructions requested by defendants-appellants (75 to 78).

III.

SPECIFICATIONS OF ERROR

No. 1. The Court erred in denying defendants-appellants' motion for a directed verdict made at the close of the case (142 to 144) and in denying defendants-appellants' motion for judgment in their favor notwithstanding the verdict and for judgment in accordance with motion for directed verdict (84 to 87) (orders denying motions 149, 91) made pursuant to Rule 50 of the Rules of Civil Procedure of the District Courts of the United States upon the following grounds, to wit:

(a) It appears from the undisputed evidence in the case:

That the appellee John E. Hubbell was an employee of the Tucson Gas, Electric Light & Power Company at the time he sustained the accident mentioned in the complaint and shown by the evidence, and was entitled to compensation and other benefits pursuant to

the policy of compensation insurance carried by said Company under the Workmen's Compensation Law of the State of Arizona, with the Industrial Commission of Arizona as insurance carrier for the injuries sustained by him which form the basis of this action; that as such an employee he was not entitled to any relief against these defendants-appellants under the Constitution and laws of the State of Arizona, particularly Article XVIII, Section 8, of the Constitution, Chapter 56, Article 9, A.C.A., 1939, and Sections 56-949 and 56-950 thereof, for that these defendants-appellants were in the same employ as the said appellee, to wit, in the employ of the said Tucson Gas, Electric Light & Power Company.

(b) It appears from the undisputed evidence in the case:

That the appellee, John E. Hubbell, prior to his injury and before the filing of this action had elected to be bound by the provisions of the said Workmen's Compensation Law of the State of Arizona in the manner provided therein; that after his injury the said appellee made an election to secure the benefits of the provisions of the said Workmen's Compensation Act, making application for said benefits and several supplemental applications therefor, without any fraud or influence of any kind, freely and voluntarily, and under the belief that he had a claim against these defendants-appellants as persons not in the employ of said appellee's employer, Tucson Gas, Electric Light & Power Company; that the said appellee, John E. Hubbell, did accept payments of compensation under

said election from the said Industrial Commission pursuant to its award dated July 9, 1949 (108, 109), during the period from the date of his accident, June 17, 1949, to and including August 31, 1949, in the sum of $621.85 and the payment by the said Commission of his medical expenses arising because of his accident in the sum of $896.00; that the said actions of the said appellee constituted and were an election valid, binding and conclusive on appellee of remedy under the provisions of Article XVIII, Section 8, of the Constitution of Arizona, and Chapter 56, Article 9, A.C.A., 1939, and particularly Sections 56-949 and 56-950 thereof, whereby the alleged claim against these defendants-appellants become assigned to and enforcible only by said Industrial Commission of Arizona to the extent it was liable to said appellees under said Compensation policy.

No. 2. (a) The Court erred in withdrawing on its own motion from the consideration of the jury the issue outlined in Specification 1(a) above and in holding as a matter of law (see Court's Statement 149, 150) at the close of the evidence that that issue should be resolved in favor of appellees and should not be submitted to the jury, for the reason that there was real and substantial evidence upon which the jury could have rendered a verdict for these defendants-appellants on the issue specified.

(b) The Court erred in withdrawing on its own motion from the consideration of the jury the issue involved in Specification 1(b) above and in holding as a matter of law (see Court's Statement 149, 150) at the close of the evidence that that issue should be resolved in favor of ap-

pellees and should not be submitted to the jury, for the reason that there was real and substantial evidence upon which the jury could have rendered a verdict for these defendants-appellants on the issue specified.

No. 3. The Court erred in refusing defendants-appellants' requested instructions numbers II and VII, as follows (75, 76):

"II.

I charge you, Ladies and Gentlemen of the Jury, that if you find from the evidence that the Tucson Gas, Electric Light & Power Company had and retained at all times the right and authority to supervise all work done by Sanderson & Porter, and the method and means of doing such work, specified in the Letter of Agreement in evidence, dated March 3, 1948, then your verdict must be for the defendants even though you find that the said Tucson Gas, Electric Light & Power Company did not at all times actually exercise such power and authority."

"VII.

I charge you, Ladies and Gentlemen of the Jury, that the plaintiffs in this case allege that the defendants, Sanderson & Porter, were independent contractors. For the purposes of this case, I charge you that whether or not the defendants, Sanderson & Porter, were independent contractors as alleged by the plaintiffs turns on the question whether the Tucson Gas, Electric Light & Power Company retained its right under the contract to supervise the services of the defendants, Sanderson & Porter, in the doing of the work specified in the Letter Agreement of March 3, 1948. That Letter Agreement in terms provides that the services of Sanderson & Porter in connection with the project were to be performed under the super-

vision of the Tucson Gas, Electric Light & Power Company and in cooperation with the officers, employees and other representatives of that Company. Under this contract, Sanderson & Porter were not independent contractors and the only way in which they could become independent contractors would be by a course of conduct on the part of the officers of the said Tucson Gas, Electric Light & Power Company and the representatives of Sanderson & Porter whereby that provision in the contract was waived.

"I therefore charge you that if Tucson Gas, Electric Light & Power Company through its officials reserved and retained its right to supervise the services of the defendants, Sanderson & Porter, at all times, even though it did not exercise that right, then the defendants in this case were mere agents or employees and were not independent contractors. The burden of proof that the defendants, Sanderson & Porter, were independent contractors is upon the plaintiffs and unless you are satisfied by a preponderance of the evidence that the plaintiffs have proven that the defendants, Sanderson & Porter, were independent contractors, your verdict must be for the plaintiffs.",

for the reason that there was real and substantial evidence upon which the jury could have rendered a valid verdict for these defendants-appellants on the issues specified. (Presentation to trial court found at Tr. 154, 155).

No. 4. The court erred in refusing defendants-appellants' requested instruction number I, as follows:

"I.

I charge you, Ladies and Gentlemen of the Jury, that if the plaintiff, John E. Hubbell, at the time he made the claims for additional compensation from

The Industrial Commission of the State of Arizona, dated July 14, 1949, August 15, 1949, August 30, 1949, and September 12, 1949, or any of them, was in such mental condition as to be able to act voluntarily, your verdict must be for the defendants.",

for the reason that there was real and substantial evidence upon which the jury could have rendered a valid verdict for these defendants-appellants on the issue specified (Presentation to trial court found at Tr. 154, 155).

No. 5. The Court erred in denying defendants-appellants' motion for a new trial wherein the errors specified in Specifications 2(a), 2(b), 3 and 4 were relied on for the reason set forth in said specifications (88 to 91, 92).

IV.

ARGUMENT

Summary

Intervenor-appellant, Tucson Gas, Electric Light & Power Company, has for years been engaged, as a public utility, in the manufacture, distribution and sale of gas and electricity in Tucson and environments. It has carried compensation insurance with the Industrial Commission of Arizona, as insurer. On June 17, 1949, appellee John E. Hubbell was engaged in working for that company as a lineman and during the course of his employment came in contact with conductors carrying 13,800 volts of electricity, to his serious and permanent injury. Said conductors were being installed as a part of the project on which defendants-appellants, Sanderson & Porter, were working. He put in a claim for compensation on July 6, 1949 (164); and an order allowing his claim was entered by the Commission on July 9, 1949 (186) under which payments of compensation

were made to him to and including August 30, 1949, in the aggregate sum of $621.85 at a daily rate of $8.40 (175) and payments were also made by the Industrial Commission for medical attention to Mr. Hubbell in the sum of $896.00 (64). Thereafter, on October 24, 1949, he undertook to file an election under Section 56-949 A.C.A. 1939 (168). If this election was effective, which defendants-appellants maintain was not the case, said appellee could, under the laws of Arizona, pursue his claim of negligence against these defendants-appellants and hold the Industrial Commission for any deficiency between what he might be able to collect from defendants-appellants and what he would have received from the Industrial Commission as such insurer had he chosen to accept compensation alone. The Industrial Commission after investigation rejected this election of October, 1949, concluding that defendants-appellants were not subject to suit as third parties under said Section 56-949 (McCluskey 124).

The undisputed evidence is that appellee John E. Hubbell believed at all times while he was accepting compensation from the Industrial Commission that he had a claim against the defendants-appellants as third parties. His testimony was that he believed he could hold both the Commission and the third parties until advised otherwise by his attorneys. It was then he made his election of October 25, 1949 (108, 109).

* * * * * * *

For some time before the contract between Tucson Gas, Electric Light & Power Company (hereinafter sometimes called the Company) and Sanderson & Porter (these defendants-appellants) was made, on March 17, 1948 (35 to

48), the Company had determined to enlarge its facilities and had made tentative arrangements to purchase a turbo-generator of 20,000 K.W. capacity. This order not materializing, it later placed an order for an 11,500 generator and that order was in effect at the time the contract was signed. After work had begun under the contract, a generator of 12,500 K.W. was actually purchased and installed, necessitating considerable adjustments and additional work by reason of the different size and capacity of the generators. These facts are related for the purpose of clarifying the situation for the Court. Thereafter, the Company decided to install another generator, this time one of 11,500 K.W. capacity. This installation was included in the contract and the second generator also installed. The installation of these generators and equipment therefor was the project involved in the contract between the Company and Sanderson & Porter. The total cost of these generators and equipment was approximately $1,500,000.00 (Lovell 117). With the decision to purchase them, Sanderson & Porter had nothing to do (Snider 128, Lovell 116, 117). While the Company had men of adequate skill and experience to install these generators and integrate them into the existing system (117, 133), additional engineers were necessary and accordingly the contract was made with Sanderson & Porter (Snider 130).

We would like at this point to state our view of the terms of the contract found in the Record at (35 to 48).

Sanderson & Porter, an engineering firm in New York City, were to render services to the Company as engineers and constructors in connection with the installation of the generators and equipment. All such services were to be

performed under the supervision of the Company and in cooperation with officers, employees and representatives thereof (Contract Article II). Sanderson & Porter were to coordinate their work so there would be turned over to the Company a plant capable of operation with reliability and economy. Orders for materials were to be in the Company's name and account. Sanderson & Porter were to be furnished in advance moneys to meet the payroll. Compensation was on percentage of cost basis.

By Articles VII and VIII of the Contract, Company reserved the right to make additions and alterations and, on thirty days' notice, to discontinue work, compensation adjustments to be by agreement or by arbitration.

We desire to add that the contract contains no provision limiting the complete right of supervision granted in Article II. The unlimited scope of this right of supervision is emphasized by the provisions of the contract reserving to the Company the right to add or subtract from the contract or to discontinue it altogether. Sanderson & Porter were to furnish no equipment or materials, gave no bond or guarantee of performance. In the enterprise they risked no money except salaries paid to their engineers and living expenses. They were to render services and, we submit, nothing else.

The evidence revealed no departure from the terms of the contract. We submit it emphasizes the Company's right of unlimited supervision. The witness Lovell, superintendent of electrical construction of the Company, called as a witness by appellees, testified concerning his daily visits to the job:

> "I was to observe the various assembly and construction progress, correlate it with the operations of our

company, both at the time and be sure it coordinated with our transmission and distribution facilities after it was in operation." (113)

"The purpose of my visits was to consult with the designers, observe the erection of equipment, observe the progress of the job, make suggested changes and familiarize myself with the progress of the job itself." (114)

"Under the contract the Company had supervision of all means and methods by which the contract should be performed. The Company never surrendered that right to supervise and control the methods and means. The purpose of all of my visits out to the plant was to see that the work was done right." (117)

Mr. Snider, President of the Company, a witness for defendants-appellants, testified:

"When the contract with Sanderson & Porter was signed to construct this power plant for us it was never the Gas Company's contention that Sanderson & Porter should be independent contractors. It would be impossible for us to operate that way because we had to have a contract where we had supervision and could control the various steps of the construction as it developed. This supervision in our company over Sanderson & Porter was absolutely essential. Our company could have installed this plant ourselves but we would have had to go out and hire engineers and designers and expand our staff. We were in a hurry to expand our facilities and about that particular time every power company in the country was expanding and good men were scarce and it would slow things up if we had to go out and test the qualifications of all men we hired as engineers and designers to be sure that they were capable." (129, 130)

And Mr. Saunders, Superintendent of Power Production, witness for defendants-appellants, testified:

> "I was out there at the new plant every day." (132) "I wanted to be sure everything was being installed properly and wanted to maintain general supervision over the work." (132) "I also had Mr. Dick Swinehart out at the plant all of the time during construction." (132) "Mr. Bill Soukup is the plant electrician who works under Mr. Swinehart and he also was present all of the time during the construction of the plant." (133)

Mr. Broockmann, representative of Sanderson & Porter on the job, testified:

> "While building this new plant, the Tucson Gas people had the right at all times to tell me exactly what they wanted to be done. The Gas Company had the right to tell me how the job should be done and I dealt almost entirely in matters of policy and finance with Mr. Snider. In matters of engineering details and plant locations we always got together with Mr. Saunders, Mr. Swinehart, Mr. Soukup and Mr. Lovell. It was my understanding and belief that this contract which Sanderson & Poter entered into with the Tucson Gas Company did not make Sanderson & Porter independent contractors. In my opinion, we were working for them and were their servants." (137)

> "The general outline of work to be done was designed in our New York office but after we arrived here in Tucson there was a great deal of work still to be done and matters to be decided and details to be worked out which could only be done in conjunction with the Gas Company itself." (137, 138)

> "There were many changes made during the course of construction out there at the plant and several times after we would complete a job Mr. Snider would come

out and say the Company did not like this or that feature and the change would be made immediately." (138)

"Mr. Snider did not attempt to supervise all of the work; sometimes he would pick on the smallest things." (140)

"We hired our employees without getting any approval from Tucson Gas Company, and we had the right to fire them without consulting Tucson Gas Company. Tucson Gas had this right, also, and I had to take one of my best supervisors off the job when Mr. Snider said take him off." (141)

Specifications 1(a), 2(a)

WHERE A CONTRACT SPECIFIES THAT THE RIGHT OF SUPERVISION OR CONTROL OF THE WORK TO BE PERFORMED THEREUNDER REMAINS COMPLETELY IN THE EMPLOYER, THE PERSON ENGAGING TO DO SUCH WORK IS NOT AN INDEPENDENT CONTRACTOR AND IS AN EMPLOYEE.

In the Summary we have undertaken to give our views of the contract and of the undisputed testimony offered at the trial concerning the practice of the parties thereunder. We thought it might be more convenient to the Court to summarize the entire case at that point and trust there has been no infraction of the rules in so doing.

Our position briefly is that by the terms of the contract the supervision and control of the project retained by the Company brought about a relationship of employer and employee between the Company and Sanderson & Porter —and not a relation of independent contractor.

At the trial evidence was received, without objection from either party, concerning the actual practice of the parties involved in the performance of the contract. We have recited our views of the evidence on that score. We

submit that it in no wise limited the sweeping scope of the power of supervision retained by the Company and reveals unmistakably that that power was not surrendered or limited in any regard in actual practice.

We assume that the law of Arizona is controlling. Whether or not the contract was made in Arizona in the strict legal sense, it was to be performed in Arizona and is therefore, we believe, governed by Arizona law.

This question has been before our Arizona Supreme Court on a number of occasions. For the convenience of the Court, we have set forth in the Appendix the Constitution and statutes which we think are involved.

THE ARIZONA LAW

By Article XVIII, Section 8, of the Arizona Constitution (amended in 1925), the Legislature was enjoined to enact a Workmen's Compensation Law by which compensation should be paid to an employee injured in the course of his employment by a necessary risk or danger inherent in the nature thereof "or by a failure of such employer, or any of his or its agents or employee or employees, to exercise due care, or to comply with any law affecting such employment". Pursuant thereto there are in effect Chapter 56, Sections 900 to 977, Arizona Code, 1939. It is not denied that appellee John E. Hubbell was entitled to compensation under this Act. Section 56-949 gives an employee entitled to compensation who is "injured by the negligence or wrong of another not in the same employ" an election to pursue his remedy "against such other". Section 56-928 undertakes to define employers and independent contractors. Although this statute is quoted in the Appendix, its pertinency in

this case justifies, we believe, quotation of paragraphs (b) and (c) thereof. (This Section is found in the Pocket Part of Volume 4 of said Code). They are as follows:

> "(b) When an employer procures work to be done for him by a contractor over whose work he retains supervision or control, and such work is a part or process in the trade or business of the employer, then such contractors and the persons employed by him, and his subcontractor, and persons employed by the subcontractor, are within the meaning of this section, employees of the original employer.
>
> "(c) A person engaged in work for another, and who while so engaged is independent of the employer in the execution of the work, not subject to the rule or control of the person for whom the work is done, but is engaged only in the performance of a definite job, or piece of work, and subordinate to the employer only in effecting a result in accordance with the employer's design, is an independent contractor, and an employer within the meaning of this section. (Laws 1925, ch. 83, Sec. 44, p. 345; rev. R. C. 1928, Sec. 1418; Laws 1945, ch. 33, Sec. 1, p. 65.)"

It is, of course, apparent that if Sanderson & Porter were employees, whether as agents or servants, of the Company, there can be no recovery by appellees in this case. No liability may attach to them as persons "not in the same employ" unless they are to be considered independent contractors.

The Arizona Supreme Court has considered these statutes and the law governing the relation of employer and employee and employer and independent contractor and has announced and adhered to the primary rule that the

question turns upon whether the employer retains the right of supervision or control of the contracted work.

In

Industrial Commission v. Byrne, 62 Ariz. 132, 134, 155 Pac.(2) 784,

the Court said:

> "We have, in a number of cases, decided that the test to determine if one is an employer or an employee is whether the employer retains supervision or control of the work. Grabe v. Industrial Comm., 38 Ariz. 322, 299 Pac. 1031; Fox West Coast Theatres v. Industrial Comm., 39 Ariz. 442, 7 Pac.(2d) 582; United States Fidelity & Guaranty Co. v. Industrial Comm., 42 Ariz. 422, 26 Pac.(2d) 1012."

That Court has declared that an important factor in determining the right of control is whether the employer may terminate the relationship without liability. In

L. B. Price Mercantile Company v. Industrial Commission, 43 Ariz. 257, 30 Pac.(2d) 491,

one Evans had a written contract with the alleged employer and had the right over a certain area to sell the latter's goods. He was killed in an automobile accident and his dependents sought compensation under the Act.

The Court had this to say on the subject:

> "And in determining if the employer retains control the most important factor is whether either party may terminate the relation without liability. 'Where such right exists,' to use the language of the court in Industrial Com. v. Hammond, 77 Colo. 414, 236 Pac. 1006, 1008, 'the workman is usually a servant. Where it does not exist, he is usually a contractor'. The power

of the employer to end the employment at any time he sees fit is incompatible with the full control of the work which an independent contractor enjoys. 14 R. C. L. 72; Press Publishing Co. v. Industrial Acc. Com., 190 Cal. 114, 210 Pac. 820; New York Indemnity Co. v. Industrial Acc. Com. of California, 80 Cal. App. 713, 252 Pac. 775; Clark's Case, 124 Me. 47, 126 Atl. 18. In Industrial Com. v. Bonfils, 78 Colo. 306, 241 Pac. 735, 736, the court said:

"'By virtue of its power to discharge, the company could, at any moment, direct the minutest detail and method of the work. The fact, if a fact, that it did not do so is immaterial. It is the power of control, not the fact of control, that is the principal factor in distinguishing a servant from a contractor. Franklin Coal & Coke Co. v. Ind. Com., 296 Ill. 329, 129 N.E. 811. The most important point 'in determining the main question (contractor or employee) is the right of either to terminate the relation without liability.'"

Again, in

Southwest L. Mills, Inc. v. Industrial Commission, 60 Ariz. 199, 134 Pac.(2d) 162,

the Court had this to say:

"Counsel for claimant contend that paragraph IV of the contract (quoted above) between the Company and the Contractor empowers the former to cancel the contract at its own will and pleasure. If this provision of the contract were susceptible of such a construction it would be very strong evidence that the Company retained supervision and control of the work of felling, hauling and delivering the timber to its mill pond at Flagstaff. It authorizes the Company, if the Contractor without its consent assigns or attempts to as-

sign the contract, or becomes insolvent or bankrupt, etc., to terminate the contract. The grounds upon which the contract might be terminated by the Company must be substantial. It could not upon its own wish or at its pleasure terminate the contract."

The latest Arizona case is, we believe,

Blasdell v. Industrial Commission, 65 Ariz. 373, 181 Pac.(2d) 620.

There the Court said:

"The body of law concerned with distinguishing independent contractors from employees is, indeed, huge. And though no hard and fast rule can be set forth, but instead each case must be determined by the sum total of its own facts, the general test laid down by our own statute (Sec. 56-928) and by the great weight of authority is whether the alleged employer 'retains supervision or control over the method of reaching a certain result, or whether his control is limited to the result reached, leaving the method to the other party.' United States Fidelity & Guaranty Co. v. Industrial Commission, 42 Ariz. 422, 26 P.(2d) 1012, 1015. In order to apply this test and so determine the extent of this 'right of control', courts look for a variety of signposts or indicia none of which are in themselves conclusive but which when taken together and applied to a particular set of facts, aid in making the line to be drawn more clear. Prosser on Torts, 1941 pp. 474, 475; Restatement of the Law of Agency, Ch. 7, Sec. 220; Lee Moor Contracting Co. v. Blanton, 49 Ariz. 130, 65 P.(2d) 35; Consolidated Motors v. Ketcham, 49 Ariz. 295, 66 P.(2d) 246; Industrial Commission v. Meddock, 65 Ariz. 324, 180 P.(2d) 580."

It is respectfully submitted that the contract, and the practice thereunder, leave no reasonable permissible deduction except that this job of installation of these generators as a part of the existing plant and system of the Company was under the complete and unlimited supervision and control of the Company and that consequently Sanderson & Porter were employees within the meaning of the Constitution and statutes of Arizona and were not independent contractors.

Specifications 2(a) and 3

NOTWITHSTANDING MOTIONS FOR AN INSTRUCTED VERDICT BY DEFENDANTS-APPELLANTS AND THE OTHER PARTIES TO THIS ACTION, DEFENDANTS-APPELLANTS WERE, UPON DENIAL OF THEIR SAID MOTION, ENTITLED TO HAVE THE ISSUE RAISED BY THE PLEADINGS WHETHER THEY WERE EMPLOYEES OR INDEPENDENT CONTRACTORS DECIDED BY THE JURY, THERE BEING AMPLE EVIDENCE IN THE RECORD TO SUPPORT A VERDICT FOR DEFENDANTS-APPELLANTS ON THAT ISSUE.

By Rule 50, Federal Rules of Civil Procedure, it is expressly provided that no waiver of the right to go to a jury results from a motion for an instructed verdict, even though all parties make like motions.

After the Court denied the several motions presented at the close of the evidence, he announced:

> "The Court: My view is, there are only two questions to talk to the jury about; the one is whether this defendant was negligent and the other is contributory negligence.
>
> "Mr. Jones: The independent contract,—you don't think the jury is concerned with that?
>
> "The Court: I think not." (149)

And in the Court's Instructions no mention of the two issues, independent contract and election of remedies, was

made. In the Court's language, they were "eliminated by rulings". (150) Before the jury retired, counsel were afforded the right to submit requested instructions, which was done (154 to 156). Our Requests VII and VIII covered this issue. It was, of course, an idle gesture as the Court had previously determined the matter and the requests were denied (155, 156).

We do not know why the Court refused to submit this issue to the jury. If he did so because he believed the contract as written was controlling (that the evidence of practice thereunder though offered by appellees as well as defendants-appellants without objection should be disregarded) and that by the terms of the contract the relation of Sanderson & Porter to the Company was that of an independent contractor, there is nothing further for us to add to our argument under Specification No. 1(a) and we submit he was in error.

If the Court took the view that on the entire evidence, the written contract and the practice thereunder, defendants-appellants were independent contractors, we would like to add to our previous argument this: an issue of fact was necessarily raised which the jury should have decided.

Witnesses on this issue were examined and cross examined. Each side undertook to present to the jury evidence to support his contention. Appellees sought to show, for example, from the witnesses that the Company was interested only in the finished job, had no interest in the details, actually made no supervision of the method of doing the work, and so on. Defendants-appellants undertook to show the reverse. The testimony of the witness Lovell, called by appellees, and of witnesses Saunders, Snider and Broock-

mann, called by defendants-appellants, is almost entirely on that issue. We invite the Court's attention to their testimony.

Unless all this testimony was utterly immaterial, and might be disregarded though offered by appellees as well as these defendants-appellants, the Court was in error, we submit, in taking this issue, on which appellees had the burden of proof, from the jury and deciding it as a matter of law. It was a denial of the right of the parties to a trial by jury, guaranteed by the Seventh Amendment to the Constitution of the United States.

As stated, the Court announced that this issue, and that of election of remedies, would not be submitted to the jury in any form whatsoever. It was perhaps unnecessary for counsel to submit the requested instructions II and VII, as obviously they would not be granted. Under the circumstances in this case it would seem to be immaterial whether those requests are technically correct or not—the Court was unwilling to submit any instructions on that issue to the jury.

We believe that they are technically correct. In any event they were clearly sufficient to bring the issue to the attention of the Court and the Court's failure to charge on the issue in any manner was error.

4 C.J.S. 629;

St. Paul etc. Insurance Company v. Bachmann, 285 U.S. 112, 52 S.C.R. 270, 76 L.Ed. 648.

See, also,

Gulf etc. Railway Company v. Moser, 275 U.S. 133, 48 S.C.R. 49, 72 L.Ed. 200.

Specifications 1(b) and 2(b)

THE ACTION OF APPELLEE JOHN E. HUBBELL IN PRESENTING CLAIMS FOR COMPENSATION UNDER THE WORKMEN'S COMPENSATION ACT AND ACCEPTING COMPENSATION AND BENEFITS OF THAT ACT PURSUANT TO THE ORDER OF THE INDUSTRIAL COMMISSION, WERE FREELY AND VOLUNTARILY MADE UNDER THE BELIEF THAT HE HAD A CLAIM FOR PERSONAL INJURIES AGAINST THE DEFENDANTS-APPELLANTS AS THIRD PARTIES AND CONSEQUENTLY AMOUNTED TO AN ASSIGNMENT OF HIS CAUSE OF ACTION AGAINST DEFENDANTS-APPELLANTS TO THE INDUSTRIAL COMMISSION OF ARIZONA. (SEE SECTIONS 56-946, 949, 950 APPENDIX.)

Appellees' first claim for compensation was signed July 6, 1949 (164). He made several supplemental claims (177 to 185). He later withdrew the one dated September 14, 1949 (108). Under the order of the Commission (186) he received compensation to and including August 30, 1949—covering a period of approximately eleven weeks (175). He also received medical benefits in a substantial sum. All the time he believed he could hold these defendants-appellants also and intended to do so (109).

No claim is made that he was induced to accept these benefits by any act on the part of these defendants-appellants or the Industrial Commission. It was not until October 24, 1949, that he filed an attempted election to hold defendants-appellants as third parties and look to the Commission for the deficiency between what he might recover from these defendants-appellants and what he would otherwise be entitled to by way of compensation. It is submitted that his earlier actions constituted an election under the provisions of 56-949 and 56-950.

If, as defendants-appellants claim, a binding election was made by appellee John E. Hubbell to accept compensation (and his election of October, 1949, consequently was

abortive) then the situation is that the Industrial Commission is the owner of the appellees' cause of action and it alone may enforce the same.

While the Commission becomes the assignee of the claim, it nevertheless may not recover more than it would otherwise have been required to pay had the injured employee accepted compensation.

Industrial Commission v. Nevelle, 58 Ariz. 325, 119 Pac.(2) 934.

The Industrial Commission makes no claim that these defendants-appellants were third parties within the meaning of Section 56-949. If that Commission is the assignee by law of the claim of the appellees, these defendants-appellants are entitled to judgment. And even if the Commission should assert any claim, now or hereafter, against these defendants-appellants, they would be limited as stated. Consequently, these defendants-appellants are interested in this feature of the case.

The equitable doctrine of election of remedies is, we believe, not applicable. We are here considering the effect of statutes expressing the public policy of the State of Arizona.

An employee has the right under the Arizona Constitution and laws to remedies under the Workmen's Compensation Act, the Employers' Liability Act (as to certain hazardous employments) and the common law (modified in the employee's favor as to a number of defenses) for personal injuries. Prior to 1925, when Article XVIII, Section 8, of the Constitution was amended to its present form, the injured employee could make his election after his injury

to accept compensation under the Workmen's Compensation Act or sue the employer in the Superior Court under the Employers' Liability Act, if the accident was within its terms, or at common law. (He could in his complaint join causes of action under the two latter.) Once, however, he elected to accept compensation on the one hand or sue his employer as stated on the other, he was not allowed to change his position. While this type of election is not the precise one here involved, we submit it is definitely analogous and that the cases thereon are controlling.

The leading case on the subject of election of remedies against the employer is

Consolidated Arizona Company v. Ujack, 15 Ariz. 382, 139 Pac. 465.

The case arose under the Constitution before it was amended in 1925. The employee had the right to exercise his election to take compensation or sue his employer after his injury. The Court said:

> "The last sentence of section 14, reads: 'Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively.' This seems to us a plain declaration by the legislature that the employee is at liberty to pursue any of the remedies provided by law until he adopts one by instituting a suit for redress, when the one adopted becomes exclusive."

This right of election after injury proved unsatisfactory and resulted in the amendment of Article XVIII, Section 8, to its present form in 1925. It now requires the employee to make his election before injury and additionally creates an automatic election on his part to accept compensation

unless he affirmatively rejects the right to compensation under the Workmen's Compensation Act.

As we understand the law, the fact that an employee is ignorant, unable to read, does not understand he has an option as to remedies, etc., is no excuse. He is bound to take compensation unless he affirmatively rejects the Act before injury. The public policy of the State is deemed best served by that inflexible attitude.

By construction of the statutes a thirteen year old boy was held to have made a binding election to take under the Act, where he failed to file a rejection. His infancy was no excuse.

S. H. Kress & Company v. Superior Court, 66 Ariz. 67, 182 Pac.(2) 931.

While we find no cases in Arizona where an employee has undertaken to avoid his implied choice to take under the Workmen's Compensation Act because of misunderstanding of his rights, there are cases where the reverse situation has arisen. In these the employee insisted that he should be permitted to repudiate a rejection which he had signed and be allowed to take compensation benefits allowed under the Act. The Court laid down the test that the rejection of the employee may not be avoided unless it was induced by fraud, coercion, misrepresentation or wrongful act on the part of the employer, insurer or someone in his behalf.

Bradley v. Industrial Commission, 51 Ariz. 291, 76 Pac.(2) 745;

Red Rover Copper Company v. Industrial Commismission, 58 Ariz. 203, 118 Pac.(2) 1102, 137 A.L.R. 740;

Whipple v. Industrial Commission, 59 Ariz. 1, 121 Pac.(2) 876.

A very late case is closer to this one, we think.

Weaver v. Martori, 69 Ariz. 45, 208 Pac.(2) 652.

In that case a guardian of a minor employee (as alleged) brought a suit against a third person instead of seeking compensation. That suit was lost and then the guardian applied for compensation under the Act. The Commission took the position that an election had been made by filing the suit and that it was binding. The court said:

> "The Commission suggests that the filing of this suit constituted an election of remedies under Section 56-950, A.C.A., 1939, and that the minor, acting through petitioner, had no right to file the instant claim for compensation. If we were dealing with the rights of an adult, or of minors who under Section 56-974, A.C.A., 1939, were deemed sui juris, this contention would be sound."

The court went on to hold, however, that the guardian had no right to make an election.

If an action at law against the third person is a binding and conclusive election, the reverse would seem to be equally true.

In

Moseley v. Lily Ice Cream Company, 38 Ariz. 417, 300 Pac. 958,

there was involved a situation similar to the one presented in this case. The injured employee accepted compensation under the Act and later brought an action against the third party. The court held that his acceptance of the compensa-

tion amounted to an assignment by him of his cause of action to the Commission and that he was therefore in no position to sue the third party. The court, however, did add this language:

> "It is urged, however, by appellant, that even though the section be constitutional, and its meaning be such that he had lost his right to sue if he chose compensation, under the particular facts in this case the election made was not binding on him. It is, of course, true that an apparent election made in a case of this nature, just as in any other case, is subject to be set aside for many reasons. But this issue must be raised by the pleadings. On examining them, it appears that appellant at no time asked to have his election set aside for any reason, although he admitted he had been advised by counsel after his acceptance of compensation and before the bringing of this action against appellee that such acceptance would bar any recourse against appellee. His contention was that he was exercising a constitutional right, which was not subject to election, and which could not be abrogated or taken away by act of the Legislature. In this particular case, therefore, we need not consider the question as to whether his apparent election might have been set aside on a proper showing, since the pleadings do not raise such an issue."

This expression was seized on by counsel in the court below as indicative of an opinion by our Arizona Supreme Court that an injured employee may make an election to sue a third party notwithstanding his prior acceptance of compensation. No doubt the Court had in mind elements of fraud, undue influence, misrepresentation and overreaching in using the words "many reasons". In any event

the Court clearly signified that an issue of fact had to be raised by the pleading—that an election could not be repudiated out of hand. The concluding sentence of the quotation is the real holding of the Court, revealing all else to be dicta or arguendo only.

Finally it is submitted that appellee John E. Hubbell should have carried his claim to the Arizona Supreme Court under the procedure set up for that purpose—certiorari under Section 56-972. After receiving an order based on his application for compensation (186) and failing in his effort through Counsel to have the Commission accept his later claim of election (McCluskey 124) the way was open to him to have the proper authority, the Supreme Court of Arizona, charged with the duty of administering this law and thoroughly cognizant of its intent and purpose from its consideration of many hearings, pass upon his contention and decide finally and authoritatively whether he had made an election to accept compensation under the Act or was entitled to make his attempted election of October 25, 1949.

While the Industrial Commission may act as insurer (and did in this case) it is nevertheless the tribunal charged with the enforcement of the Workmen's Compensation Act and necessarily acts in a semi-judicial capacity.

Red Rover Copper Company v. Industrial Commission, supra.

To that extent its jurisdiction is plenary and the sole authority to review its orders and actions is the Supreme Court of the State.

S. H. Kress & Company v. Superior Court, 66 Ariz. 67, 182 Pac.(2) 431.

Specifications 2(b) and 4

As already stated, the Court gave no reason for withdrawing from the jury the issue whether appellee John E. Hubbell had made an election to accept compensation benefits before his attempted election of October 25, 1949.

From the evidence the jury could have reasonably found that said appellee with full knowledge of the consequences of his act accepted compensation benefits. It is true he denied knowing that he had to make an election until he had employed attorneys (105) but surely these defendants-appellants are not bound to accept his testimony—that of adverse party—as true. There was ample evidence in before the jury to contradict appellee—such as his failure when he put in his original claim for compensation to mention Sanderson & Porter when answering question whether another person caused accident (164), thus leaving the Commission completely ignorant of the fact that a third party was involved—a fact not known by the Commission until nearly three months after the injury (McCluskey 123). There is no suggestion in the record that appellees advised these defendants-appellants that they intended to hold them as third parties until the appellee John E. Hubbell sought to make his October election. If the Moseley case, supra, is any authority for the contention that in Arizona one may be relieved of the consequences of an election under the Workmen's Compensation Act for reasons short of those generally recognized in courts of equity where rescission is sought, it also is authority for the proposition that such reasons must be proved as other issues. Here the intent and purpose of appellee John E. Hubbell in accepting compensation bene-

fits over a considerable period of time, always believing he had a claim founded on negligence against defendants-appellants, was necessarily a question of fact for the jury.

Specification No. 5

Argument hereunder would be superfluous. We call the Court's attention to our argument under Specifications 2(a), 2(b), 3 and 4.

It is respectfully submitted that the judgment should be reversed with instructions either (a) to enter judgment for the defendants-appellants or (b) grant a new trial as the Court may be advised.

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(Appendix follows)

Article XVIII, Section 8, Arizona Constitution, reads:

"Section 8. (Workmen's compensation.)—The legislature shall enact a Workmen's Compensation Law applicable to workmen engaged in manual or mechanical labor in all public employment whether of the state, or any political subdivision or municipality thereof as may be defined by law and in such private employments as the legislature may prescribe by which compensation shall be required to be paid to any such workman, in case of his injury and to his dependents, as defined by law, in case of his death, by his employer, if in the course of such employment personal injury to or death of any such workman from any accident arising out of, and in the course of, such employment, is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its agents or employee or employees, to exercise due care, or to comply with any law affecting such employment; provided that it shall be optional with any employee engaged in any such private employment to settle for such compensation, or to retain the right to sue said employer as provided by this constitution; and, provided further, in order to assure and make certain a just and humane compensation law in the State of Arizona, for the relief and protection of such workmen, their widows, children or dependents, as defined by law, from the burdensome, expensive and litigious remedies for injuries to or death of such workmen, now existing in the state of Arizona, and producing uncertain and unequal compensation therefor, such employee, engaged in such private employment, may exercise the option to settle for compensation by fail-

ing to reject the provisions of such Workmen's Compensation Law prior to the injury.

"The percentages and amounts of compensation provided in House Bill No. 227 enacted by the seventh legislature of the state of Arizona, shall never be reduced nor any industry included within the provision of said House Bill No. 227 eliminated except by initiated or referred measure as provided by this constitution."

The following references are to Arizona Code Annotated, 1939:

Section 56-904, so far as pertinent, reads:

"The commission may adopt rules of procedure, rules for the fixing of rates, for the presenting of claims, and such other rules and regulations as are necessary for its business, and change the same from time to time. It may, in its name, sue and be sued in all actions or proceedings arising out of or relating to the state compensation fund."

Section 56-907, so far as pertinent, reads:

"The commission shall have full power, jurisdiction and authority to administer and enforce all laws for the protection of life, health, safety and welfare of employees in every case and under every law, where such duty is not now specifically delegated to any other board or officer, * * *".

Section 56-928 reads:

"56-928. Employers subject to law.—(a) Employers subject to the provisions of this article are: 1. the state, 2. each county, city, town, municipal corporation, and school district, and, 3. every person who has in his employ three (3) or more workmen or opera-

tives regularly employed in the same business or establishment, under contract of hire, except agricultural workers not employed in the use of machinery, and domestic servants; but exempted employers of agricultural workers or domestic servants, or employers of less than three (3) workmen or operatives, may come under the provisions of this article by complying with its provisions and the rules and regulations of the commission. For the purposes of this section 'regularly employed' includes all employments, whether continuous throughout the year, or for only a portion of the year, in the usual trade, business, profession, or occupation of an employer.

"(b) When an employer procures work to be done for him by a contractor over whose work he retains supervision or control, and such work is a part or process in the trade or business of the employer, then such contractors and the persons employed by him, and his subcontractor, and persons employed by the subcontractor, are within the meaning of this section, employees of the original employer.

"(c) A person engaged in work for another, and who while so engaged is independent of the employer in the execution of the work, not subject to the rule or control of the person for whom the work is done, but is engaged only in the performance of a definite job, or piece of work, and subordinate to the employer only in effecting a result in accordance with the employer's design, is an independent contractor, and an employer within the meaning of this section. (Laws 1925, ch. 83, sec. 44, p. 345; rev., R. C. 1928, sec. 1418; Laws 1945, ch. 33, sec. 1, p. 65.)

Section 56-930, so far as pertinent, reads:

"'Order' shall mean and include any rule, regulation, direction, requirement, standard, determination or decision of the commission; * * *

"'Compensation' shall mean the compensation and benefits provided herein;

"'Award' shall mean the finding or decision of the commission of the amount of compensation or benefit due an injured or the dependents of a deceased employee."

Section 56-946, reads:

"56-946. Compensation exclusive remedy—Exceptions.—The right to recover compensation pursuant to the provisions of this article for injuries sustained by an employee shall be the exclusive remedy against the employer, except as provided in the two preceding sections, and except where the injury is caused by the employer's wilful misconduct and such act causing such injury is the personal act of the employer himself, or if the employer be a partnership, on the part of one of the partners, or if a corporation, on the part of an elective officer thereof, and such act indicates a wilful disregard of the life, limb, or bodily safety of employees, such injured employee may, at his option, either claim compensation or maintain an action at law for damages. The term "wilful misconduct" as employed in this section shall be construed to mean an act done knowingly and purposely with the direct object of injuring another. (Laws 1925, ch. 83, sec. 65, p. 345; rev., R.C. 1928, sec. 1432.)"

Section 56-949, reads:

"56-949. Liability of third person to injured employee.—If an employee entitled to compensation hereunder is injured or killed by the negligence or wrong

of another not in the same employ, such injured employee, or in case of death, his dependents, shall elect whether to take compensation under this title or to pursue his remedy against such other. If he elect to take compensation, the cause of action against such other shall be assigned to the state for the beneft of the compensation fund, or to the person liable for the payment thereof, and if he elect to proceed against such other, the compensation fund or person, shall contribute only the deficiency between the amount actually collected and the compensation provided or estimated herein for such case. Compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for herein shall be made only with the written approval of the commission, or of the person liable to pay the same. (Laws 1925, ch. 83, sec. 66, p. 345; rev., R. C. 1928, sec. 1435.)"

Section 56-950, reads:

"56-950. Election of remedy—Waiver.—Every employee, or his legal representative in case death results, who makes application for an award, or with the consent of the commission accepts compensation from an employer, waives any right to exercise any option to institute proceedings in any court. Every employee or his legal representative in case death results, who exercises any option to institute proceedings in court waives any right to any award or direct payment of compensation from his employer. (Laws 1925, ch. 83, sec. 67, p. 345; R. C. 1928, sec. 1436.)"

Section 56-971, reads:

"56-971. No injunction to issue—Exception.—No injunction shall issue suspending or restraining any order, award, classification, or rate adopted by the

commission, or any action of any officer required by the provisions hereof, except as herein provided; but nothing herein shall affect any defense to an action brought by the commission or the state in pursuance of the authority contained herein. (Laws 1925, ch. 83, sec. 88, p. 345; rev., R. C. 1928, sec. 1451.)"

Section 56-972, reads:

"56-972. Appeal to Supreme Court.—Within thirty (30) days after the application for a rehearing is denied, or if the application is granted within thirty (30) days after the rendition of the decision on the rehearing, any party affected thereby may apply to the Supreme Court of the state for a writ of certiorari to review the lawfulness of the award. Such writ shall be made returnable within thirty (30) days, and shall direct the commission to certify its record, proceedings and the evidence to the court. On the return day the cause shall be heard in the court unless for good cause continued, and shall be heard on the record of the commission as certified by it. The review shall be limited to determining whether or not the commission acted without or in excess of its power; and, if findings of fact were made, whether or not such findings of fact support the award under review. If necessary the court may review the evidence.

"The commission and each party to the proceeding before the commission may appear in the review. The court shall enter judgment either affirming or setting aside the award. The rules of civil procedure relating to certiorari shall, so far as applicable, and not in conflict herewith apply. (Laws 1925, ch. 83, sec. 90, p. 345; rev., R. C. 1928, sec. 1452.)"